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## MARY MARING: A ROLE MODEL FOR A JURIST

GERALD W. VANDEWALLE\*

During her tenure on the North Dakota Supreme Court, Justice Maring made a lasting impact on our judicial system. This includes her efforts to eliminate gender disparity and bias in judicial proceedings, reform our judicial system's employment policies, and act as a driving force in the creation and implementation of the North Dakota Juvenile Drug Court system. Through her efforts, North Dakota now serves one of our state's most vulnerable populations by giving treatment to non-violent offenders and ending the cycle of addiction.

Justice Maring's passionate advocacy for disadvantaged groups is only overshadowed by her well-reasoned and imposing body of jurisprudence. While she and I disagreed on occasion, I was impressed by her deliberate and contemplative approach to the law. Justice Maring was compassionate to the parties before the Court, but understood the effect her decisions could have in the future and was mindful to uphold the rule of law above all else. Her consistent foresight in opinions exemplified the best of our legal profession. I appreciate the North Dakota Law Review providing me an opportunity to revisit some of the many opinions penned by Justice Maring and to illustrate how her scholarship and deliberation has impacted North Dakota jurisprudence.

One of Justice Maring's most well cited cases,<sup>1</sup> recognized by the United States Supreme Court,<sup>2</sup> demonstrates her keen mind and foresight in grappling with preeminent legal problems. In *Hoff*, Justice Maring's opinion centered on enforcement of visitation rights by grandparents against a child's natural mother. Our Court held unconstitutional the 1993 version of North Dakota Century Code section 14-09-05.1, which provided grandparents of an unmarried minor must be given visitation rights to the minor child unless the trial court found visitation was not in the best interest

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\* Chief Justice, North Dakota Supreme Court. I thank my judicial clerk, Justin Hagel, for his assistance on this article.

1. *Hoff v. Berg*, 1999 ND 115, 595 N.W.2d 285.

2. *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (citing *Hoff v. Berg*, 595 N.W.2d 285, 291-92 (N.D. 1999)).

of the minor, and visitation rights of grandparents were presumed to be in the best interest of the minor child.<sup>3</sup>

Justice Maring's analysis drew on extensive research of United States Supreme Court precedent, North Dakota constitutional interpretation, and holdings from sister jurisdictions in determining the extent of a natural parent's fundamental liberty interest in raising his or her children.<sup>4</sup> In applying strict scrutiny to this fundamental right, the state has the burden of proving a compelling circumstance to justify governmental intervention in denying parents the ability to decide with whom their children may associate.<sup>5</sup> Neither the state, nor the appellant, established a compelling interest justifying a presumption that grandparent visitation outweighs parents' fundamental liberty interest in controlling with whom their children associate.<sup>6</sup> While sympathetic to the plight of grandparents, Justice Maring remained mindful of the rule of the law and suggested a more narrowly tailored visitation statute under the due process clause of the United States and North Dakota Constitutions.<sup>7</sup> The ultimate result held the law unconstitutional and lead to an amendment to the North Dakota Century Code section 14-09-05.1 to meet the standard established in the opinion.<sup>8</sup>

One year later, the United States Supreme Court would approvingly cite Justice Maring's determination that grandparent visitation statutes must be constructed to serve the interest of parents' fundamental right to care, custody, and control of their children, including whom they associate with.<sup>9</sup> In a case similar to *Hoff*, the United States Supreme Court, affirming the Washington Supreme Court, struck down a Washington state statute<sup>10</sup> granting third-party visitation to a child against a parent's wishes if visitation was found to be in the best interest of the child.<sup>11</sup> The superior court had interpreted the statute as creating a presumption that grandparent visitation was in the best interest of the child.<sup>12</sup> The court of appeals reversed and dismissed the petition, and the Washington Supreme Court

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3. N.D. CENT. CODE § 14-09-05.1 (1993).

4. *Hoff*, ¶¶ 8-11, 595 N.W.2d at 288-89.

5. *Id.* ¶ 16, 595 N.W.2d at 292.

6. *Id.* ¶¶ 17-18.

7. *Id.* ¶ 18.

8. See N.D. CENT. CODE § 14-09-05.1 (2001).

9. *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (citing *Hoff v. Berg*, 595 N.W.2d 285, 291-92 (N.D. 1999)).

10. WASH. REV. CODE § 26.10.160(3) (1989).

11. *Troxel*, 530 U.S. at 75.

12. *Id.* at 69.

upheld the reversal.<sup>13</sup> While citing *Hoff*, and applying similar reasoning, the United States Supreme Court held the statute unconstitutional, finding it to be an infringement of parents' fundamental right to care and control of their child under the Due Process Clause of the United States Constitution.<sup>14</sup>

Justice Maring also advocated for the presumption of innocence before the law and was unshakeable in her resolve to protect the rights of the accused from prejudice or unlawful restraint. In a case of first impression before our Court, and one which demonstrates Justice Maring's commitment to constitutional protections, we determined a North Dakota juvenile court violated an accused's due process rights by refusing to remove his restraints during an adjudicatory hearing.<sup>15</sup> The case involved a juvenile who was found delinquent based upon his commission of burglary, robbery, and disorderly conduct.<sup>16</sup> During the delinquency hearing, the juvenile was shackled and requested removal of his handcuffs.<sup>17</sup> The presiding judicial referee denied the request, deferring to the policy of the sheriff's office.<sup>18</sup> The accused appealed the referee's order arguing, among other issues, a denial of constitutional right to a fair hearing and due process for wearing restraints.<sup>19</sup>

Justice Maring's opinion extended the right of an adult defendant to appear in court free from physical restraint to juvenile hearings during both guilt and sentencing proceedings.<sup>20</sup> Relying on United States Supreme Court precedent and application of constitutional protections in other states, Justice Maring outlined the standard by which a trial court must determine shackling is required.<sup>21</sup> The opinion also places the burden on the state to prove, beyond a reasonable doubt, any shackling error did not contribute to a verdict.<sup>22</sup>

Justice Maring's lasting impact on our body of law also encompasses domestic relations and custody disputes. One important case demonstrates

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13. *Id.* at 62.

14. *Id.* at 72-75.

15. Interest of R.W.S., 2007 ND 37, ¶ 17, 728 N.W.2d 326, 331.

16. *Id.* ¶ 2, 728 N.W.2d at 328.

17. *Id.*

18. *Id.*

19. *Id.* ¶ 7.

20. *Id.* ¶ 17, 728 N.W.2d at 331.

21. *Id.* ¶ 18 (requiring specific findings as to the accused's record, temperament, the desperateness of his situation; the security situation in the courtroom and courthouse; the accused's physical condition; and whether there was an adequate means of providing security that was less prejudicial).

22. *Id.* ¶ 16.

her efforts to provide fair consideration of both parties during a custody dispute, while ensuring a child's best interest remains paramount. In *Stout v. Stout*,<sup>23</sup> Justice Maring's opinion clarified prior case law on the factors a district court must consider in a custodial parent's request for removal of a child from North Dakota.<sup>24</sup> Our Court reversed a district court's denial of a request to relocate a child from North Dakota to Arkansas based on its erroneous view of the "best interest of the child" factors.<sup>25</sup>

While North Dakota policy primarily considers the "best interest of the child" in determining removal, the factors in evaluating whether the move is in "the best interest of the child" were not clearly outlined prior to this case.<sup>26</sup> In a detailed review, Justice Maring examined the national trend evaluating the jurisdictional move of a child, specifically referenced state statutes similar to North Dakota, weighed applicable standards of law, and established the following four-part test in determining whether relocation to another jurisdiction is proper:

1. The prospective advantages of the move in improving the custodial parent's and child's quality of life.
2. The integrity of the custodial parent's motives for relocation.
3. The integrity of the non-custodial parent's motives for opposing the move, particularly the extent such opposition is intended to secure a financial advantage with respect to continuing child support.
4. Whether there is a realistic opportunity for visitation which can provide an adequate basis for preserving and fostering the non-custodial parent's relationship with the child if relocation is allowed.<sup>27</sup>

This test takes into account the unique issues presented when determining the "best interest of the child" in relocation cases. Parental visitation encompasses the interests of the entire family unit, as visitation between a child and parent is necessary to maintain a healthy and loving relationship. Balancing the interests of the family requires weighing monetary and emotional concerns, and often trial courts are unable to satisfy all parties.<sup>28</sup>

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23. 1997 ND 61, 560 N.W.2d 903.

24. *Id.* ¶¶ 33-34, 560 N.W.2d at 913-14.

25. *Id.* ¶ 8, 560 N.W.2d at 906.

26. *Id.* ¶¶ 9-13, 560 N.W.2d at 906-08.

27. *Id.* ¶ 19, 560 N.W.2d at 911.

28. *Id.* ¶¶ 29-30, 560 N.W.2d at 912.

While later restated,<sup>29</sup> the standard outlined in Justice Maring's opinion appropriately considers the best interest of the child in the context of encouraging visitation of both parents while not denying a child the benefits any out-of-state move may provide. Her approach to the law is illustrated by this test. The opinion is highly contemplative, thorough in its research of our body of law, and it takes a big-picture look to future parties and the effect this standard would have on their lives.

These examples, along with her dedicated service to our judicial system, place Justice Maring among the finest jurists I have known. While we did not always agree on the law, we never allowed our professional disagreement to interfere with our service to the public, and I respected Justice Maring's high quality work even when we were not of one mind. I hold her in the highest regard as a colleague and professional. I'm privileged to have served with such an inspirational figure to our legal profession.

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29. *See* *Hawkinson v. Hawkinson*, 1999 ND 58, ¶ 9, 591 N.W.2d 144, 147 (restating factor four).